CBQ

Criminal Bar Quarterly Issue 3: September 2009

McNaughten—Was he really mad?

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- The latest authority on ASBOs

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The Editor


John Cooper

This edition has a famous name on its cover picture. Daniel McNaughten fired a pistol at the private secretary to the Prime Minister, Sir Robert Peel, and has long been associated with insanity. In a fascinating and exclusive piece for the CBQ, Sian Busby suggests that McNaughten might not have been as mad as we had all assumed.

We continue the retrospective approach with another exclusive. As Kevin Spacey prepares his forthcoming production on Clarence Darrow, the CBQ publishes a revealing article about the notorious trial lawyer, portrayed by Spencer Tracey in the film *Inherit the Wind*.

Bringing us right up to date are Robert Banks, Paul Mendelle Q.C., Abigail Bright and the erudite David Etherington Q.C., in what I hope you will agree is a varied edition.

John Cooper

The views expressed here are not necessarily the views of the Criminal Bar Association.

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CHAIRMAN'S COLUMN


Peter Lodder Q.C.

September will see a change of chairmanship for the Criminal Bar Association. My term of office will finish and the leadership of the CBA will pass into the capable hands of Paul Mendelle Q.C. Paul has already put in much sterling work as Vice Chairman.

In many ways I have found this a stimulating and interesting year, but beyond doubt one of the highlights has been my visits to the circuits. I have visited every circuit at least once and had the great fortune to dine with a wide variety of members, and occasionally judges, on each of them: most recently in June at the Leeds Club with the North East Circuit at Grand Court, and in July with the Western Circuit in Winchester College for Grand Night. Both were splendid evenings with great entertainment, local ritual and excellent examples of the Bar at its best. I have fond memories of similar evenings in Cardiff, Birmingham, Manchester and London, amongst others. I have always been given a warm and generous reception.

The CBA is a national organisation and these visits are an important aspect of the Association's role. It is vital that all criminal practitioners can hear at first hand what we are doing, to have the opportunity to question the leadership and to discuss their own local problems. It is gratifying that countrywide the CBA is seen as another voice for their aspirations and concerns; not as a rival to any of the well established circuit structures but working together in parallel. The CBA has continued with its policy of increasing circuit involvement, particularly with the Spring Conference. This year we had an excellent dinner and meeting in Manchester. Plans are well in hand for the 2010 conference to take place in Bristol. These follow on from the successes of previous years in Birmingham and in York.

My view that this is a great profession has been reinforced by these visits. I am constantly impressed by the dedication and professionalism of the typical member of the criminal bar. What also emerges is that wherever we are in the country we face common issues and that working together we are a much more effective force. To this end, over the past year, at the many meetings I have attended with the circuit leaders and with the Chairman of the Bar, we have sought to keep the criminal bar as a major focus of attention.

Nevertheless we continue to face significant challenges. As has been catalogued in this column and elsewhere, the landscape of criminal justice is constantly changing. The time when the bar was the dominant supplier of advocates in the Crown Court has gone. In both prosecution and defence the market of today is very different from just a few years ago and we will have to adapt if we are to compete. Personally I am confident that we can do this. In order to continue to assist I have agreed to co-chair with Nicholas Green Q.C. (the Vice Chairman of the Bar) a taskforce which includes all of the circuit leaders and which will look at new business models, regulatory change to allow real competition and at different approaches to funding criminal defence work. We hope to produce a consultation document for the profession towards the end of September. This will be your chance to say how you would wish your profession to develop—please take advantage of it!

Much progress has also been achieved with the prison advertisements project. The Leader of the Northern Circuit, Richard Marks Q.C., has led the initiative in drafting copy and negotiating with the various prison magazines. Publication is imminent.

In other spheres we have also had some measure of success. As you may have heard the Legal Services Commission announced that it will not now introduce Best Value Tendering (BVT) before a full evaluation has been undertaken. We are not out of the woods yet, but the announcement indicates there will be no implementation before 2013. This puts it back to a time after the next general election. Together the Bar Council and the CBA fielded a strong BVT team led by Desmond Browne Q.C. and Paul Mendelle Q.C. and a number of members of the CBA Committee. They deserve our thanks.

Success also in gaining some recognition that there is a proper basis in our concerns about the CPS advocacy policy. There were echoes of these concerns in Her Majesty's Crown Prosecution Service Inspectorate's (HMCPSI) report on advocacy in the CPS and in the House of Commons Justice Select Committee report into the CPS—both of which have been published in the last few weeks. I gave evidence to both enquiries. In particular the Inspectorate report finds that a watershed has been reached so that consolidation is now appropriate, and it observed that in the pursuit of quantity the CPS has lost sight of quality. There is specific reference to justification for the more measured criticisms which we and others have been making but also to the more collaborative and less combative relationship with the self-employed Bar.

At the same time we commissioned a report from Europe Economics to examine the published accounts of the CPS and test the oft-repeated assertions that in-house advocacy is cheaper than using the self-employed Bar. The findings attracted a great deal of press interest, principally because they contradicted what has otherwise become an accepted mantra. This has caused discomfort in some quarters—but there is an important truth that in these straightened times if the self-employed Bar is cheaper, and particularly when it operates at a high standard, then it should be used. I hope that the combination of our analysis of the economic argument and the observations of these reports will cause the CPS to realise that there is merit in what we have been saying. We have been arguing for some time for a vertical structure so as to provide opportunities for the most junior tenants to develop prosecution practices, so that they may become the senior prosecutors of the future. I very much hope that we can take forward our discussions with the CPS.

It will help if there is recognition on both sides that the evidence of these various reports does not, in fact, all point one way. As I have said before, we must pay special attention to our own standards. The CPS Inspectorate report also looked at the performance of members of the bar instructed by the CPS. The inspectors included former judges. Their report contains some criticism of the self-employed Bar: describing a small group as being lacklustre and one practitioner as being poor. It does not help our cause when we are confronted with such observations. I am pleased to note however, that the inspectors found significantly higher standards of trial advocacy at the Bar.

It has been a huge privilege to serve the Criminal Bar. The burden of office has been made a great deal easier by the assistance of an excellent committee to whom I express my deep gratitude: frequently pressed into serving on working parties, achieving difficult deadlines or attending meetings at unsocial hours, even with the demands of their own practices, they always came up trumps. Now you will have a different chairman. I wish him, and all of you, the very best of luck.

Peter Lodder Q.C.
Chairman

Who Got the Benefit?—CBQ May 2009

From His Honour John Samuels Q.C.

Dear Sir

I note, with some amusement, the comprehensive analysis of the forfeiture and confiscation regime provided by your contributor. He comments that the trial judge in **May** "had some difficulty with the sums, confusing benefit with realisable assets". As that trial judge I am always happy to accept justifiable criticism, even from junior counsel; but your readers may be more interested in the facts. My first instance decision, delivered in a reserved judgment on August 2, 2002, ran to 28 pages. It identified nine discrete issues for decision, all of which were duly discussed and resolved. The calculation of the benefit figure in relation to Mr May was not one of them: it had been assessed by the Crown, and was agreed by the defence "less such further sums as might be identified in the recovery issue".

My decision on eight of the nine discrete issues was upheld by the Court of Appeal on January 28, 2005. The reserved decision stated (at [42]): "(May's) level of benefit (was) correctly determined by the judge." In the subsequent decision of the House of Lords on May 14, 2008 (this case echoing *Jarndyce v Jarndyce* for the glacial speed with which it progressed) the Committee was "grateful for the lucid judgment of Keene L.J.". So—if I had a problem with my sums, I was not alone. How then did this perceived problem arise? Both before me, and before the Court of Appeal, it had been the Crown who asserted the benefit figure; but it was only in the Lords that the Crown's initial calculation was observed to be mistaken.

Perhaps your contributor's interest in getting the facts right is related to his subsequent parenthetical offering about me: "For what it is worth, the judge who confused benefit with realisable assets had been a Chancery Silk." I admit that I was a practising Silk for 16 years before joining the Circuit Bench in 1997, but I ceased to practise as a member of the Chancery Bar when I completed my first 6 months pupillage in 1964.

Even if my first instance judgment was not readily available to your contributor before he penned his *ex cathedra* criticism, the decision of the Court of Appeal was.

Yours

John Samuels


Paul Mendelle Q.C.

THE CASE OF BABY P

Paul Mendelle Q.C., counsel for the mother, dissects the case

The publicity

Although there had been reporters in court during most of the murder trial, the extraordinary firestorm of publicity that broke after the verdicts caught at least one lawyer by surprise.[1] What was it about this case that so captured the public attention? It couldn't have been the rarity of child deaths: official statistics show that every ten days in England and Wales one child is killed at the hands of their parent. In half (52 per cent) of all cases of children killed at the hands of another person, the parent is the principal suspect.[2] Home Office crime figures show on average, every week in England and Wales one to two children are killed at the hands of another person.[3] In 2005/2006, 55 children were killed at the hands of another person in England and Wales.

Neither did it seem to be warranted by the particular failings of the local authority's social services department: their story of overstretched staff and poor decision-making, captured in the headlights of hindsight, was not unfamiliar: shortly after the murder trial concluded, it was revealed that Ed Balls had ordered a "sweeping investigation" into Doncaster Council's children's services department, which Ofsted rated as "inadequate" after a detailed assessment following the deaths of **seven** youngsters through abuse or neglect since 2004. Yet this terrible figure attracted a fraction of the publicity of Baby P. The answer seemed to be the identity of the local authority: Haringey, where eight years earlier Victoria Climbie had been killed and whose death had been the subject of the Laming Inquiry in 2003.[4] For the press, there was a straight line between the two cases.

Common features

Not only do the numbers show that child killing is depressingly more common than most would care to think, many of the features of the Baby P case itself were not unique. Indeed, they bore striking similarities to the case of *Ikram*[5] that I had defended the previous year; both boys aged 17 months old at the time of death; both receiv-

1 The author, who represented the mother of Baby P at both trials.
2 Home Office, 2007, Homicides, Firearms Offences and Intimate Violence 2005/2006: Supplementary Volume 1 to Crime in England and Wales 2005/2006.
3 Home Office, 2007, Homicides, Firearms Offences and Intimate Violence 2005/2006: Supplementary Volume 1 to Crime in England and Wales 2005/2006. *http://www.homeoffice.gov.uk/rds/pdfs07/hosb0207.pdf*

4 *http://www.victoria-climbie-inquiry.org.uk/index.htm*
5 [2008] 2 Cr.App.R.(S.) 114 (p.658).

ing regular medical treatment before death; both sustained serious fractures that were only discovered at the post mortem examination; both died from complications of those fractures rather than directly from the injuries themselves; and in both cases, the parent and step-parent were charged with murder and the new statutory offence of causing or allowing the death of a child contrary to of s.5 Domestic Violence Crime and Victims Act 2004.

Broken back

The final and ultimately fatal injury in Baby P's case had been what was widely reported as a broken back. In fact, it was a fracture/dislocation through the intervertebral disc between D12 and L1. That particular injury required an extremely forceful hyperextension of the spine, in other words, bending the child backwards; the prosecution suggested by, for example, forcing Peter's back over a bent knee or over a banister rail. The effect of that particular injury if properly treated would have been to cause paralysis from the level of the injury down. No expert in the case had come across such an injury before, yet by a macabre coincidence, at virtually the same time, there was a trial in Leeds Crown court of a defendant who was convicted of the murder of his 16-month-old daughter by snapping her spine.[6] For some reason, the publicity following that conviction was a fraction of what the Baby P trial attracted.

The evidence

The evidence called by the prosecution against this defendant (there were two other defendants, her boyfriend and a lodger) fell broadly into three parts.

Firstly, her former husband, friends and family, gave detailed background evidence about her, her marriage and her care of Peter.

Secondly, there was the evidence from the social workers and health professionals of their many contacts with Peter, from the first involvement of social services in December 2006 to his death in August 2007.[7]

Thirdly, there was the complex expert evidence obtained by the prosecution after Peter's death. There was no shortage on this front as it included: a forensic pathologist[8]; a paediatric forensic pathologist[9]; a paediatric dermatologist[10]; a forensic neuropathologist[11]; a paediatric spinal surgeon[12]; a consultant paediatrician specialising in nutrition[13]; and a paediatric gastroenterologist.[14]

6 The mother, who was apparently charged with both child cruelty and the s.5 offence received, a 12-month suspended sentence: *http://www.independent.ie/world-news/europe/dad-who-snapped-babys-*
7 The figure of 60 contacts between Peter and social services that was widely bandied about in the media in the days after the trial was wrong. This was derived from a defence schedule given to the jury, which showed the total contacts between the defendant and all the health professionals, social workers and police. Including the health visitor's contacts and meetings at Social Services the true figure was about 40 over a nine-month period.
8 Nat Carey.
9 Professor Risdon.
10 Doctor Atherton.
11 Professor Harding.
12 Mr Tucker.
13 Williams.
14 Professor Milla.

A common problem

This wealth of prosecution expert evidence created two particular problems, one commonly faced by all those who defend in cases of this nature and one somewhat less common.

The common problem was the difficulty the defence had in finding experts to match those called by the prosecution. It is not just that there may be few experts in the particular field (for instance, there is only one paediatric forensic pathologist practising in the United Kingdom) or that the prosecution tend to get the best ones first. It is the noticeable reluctance of many experts to be defence witnesses, a trend that has become more pronounced since the Sally Clark case.

This difficulty in finding the right expert—my solicitor eventually managed to find a forensic paediatric pathologist in America who was prepared to act—is not made any easier by legal aid funding. The whole process of finding, securing and funding the right paediatric experts is an onerous task and, not for the only time, I was grateful to have a solicitor advocate as my junior.

A not-so-common problem

The last doctor to see Peter alive was a consultant paediatrician, Dr Al Zayyat. She examined him on August 1, two days before his death. The expert evidence of the prosecution neuropathologist was that the spinal injury was inflicted **before** Dr Al Zayyat examined Peter but her clinical findings were inconsistent with its presence. The possibilities were that the expert evidence was wrong and injury was not present, or that she had failed to spot an injury that would have caused P great pain and at least lower limb paraesthesia if not paralysis. That she might have missed such an injury was not inconceivable as there were already doubts about her reliability; she had not noticed that Peter had eight broken ribs, injuries that all experts agreed were inflicted at least a week before death.

The solution the prosecution suggested to this not-so-common problem was they would not call Al Zayyat at all but would allow the defence to call her if they wished. The prosecution thus chose to rely on the expert evidence post mortem in preference to the eye witness evidence of a trained doctor. Unsurprisingly, the defence objected, maintaining that the prosecution obligation was to call this key witness of fact regardless of whether her evidence was or might become inconsistent with later expert evidence.

Skeleton arguments were served and the matter was set down to be argued at the start of the trial. Very sensibly, the judge declined to decide that issue at such an early stage and by the time Al Zayyat's evidence was due to be heard in the normal course, we had agreed an accommodation with the prosecution that allowed them some latitude in examination in chief; and so she was called as part of their case. As the doctor is currently facing disciplinary proceedings arising out of her examination of Peter, I shall say nothing about her evidence save to remark that we then understood why the prosecution had initially not wanted to call her.

The prosecution closed their case on the basis that the spinal injury was indeed present when Al Zayyat examined Peter. Our expert neuropathologist suggested it may not have been, and was inflicted after that examination.

The course of the murder trial

At the start of the trial, the defendant pleaded guilty to the s.5 offence, saying on re-arraignment, "Not guilty of causing, guilty of allowing". At first, the prosecution sought to argue this was not a sufficient plea to the offence and the jury should try that count. However, the prosecution soon conceded that, by her plea, there was no longer any issue for the jury to try, as there are not two separate offences of "causing" and "allowing" but a single offence of "causing or allowing".

So long as both murder and the s.5 offence are on the indictment, s.6 of the Act provides that a submission of no case cannot be made until all the evidence has been heard, i.e. prosecution and defence evidence. The mother was the only one of the three defendants to give evidence. After her evidence was completed, the learned judge heard submissions of no case. He allowed the submission of the mother and the lodger in relation to the murder count and she thus took no further part in the trial. The boyfriend was acquitted of murder by the jury but both he and the lodger were convicted of the s.5 offence.

The rape trial

Very shortly before the murder trial began, the mother's boyfriend was charged with the anal rape of another child in respect of whom the mother was charged with wilful neglect. The prosecution (quite properly) declined to join these charges to the murder indictment, but pressed ahead with the proceedings after the murder trial finished. This second prosecution presented some unusual difficulties, one of which led the court to adopt a unique solution.

Competence of witness

At the outset, the defence argued, in accordance with s.53 of the Youth Justice and Criminal Evidence Act 1999, that the child was not competent to be a witness. Although she was nearly 4½ at the time of the trial, her ABE interview had been made a year earlier when she was 3½ and her first allegation of sexual abuse (arguably not of anal rape) was made six months before that. There is good authority that a delay of 9 months from allegation to trial with child witnesses is unacceptable (*Powell*[15]) let alone one of 18 months. What made the position even more difficult was that the offending began when she was little more than two, so she was having to cast her mind back almost half her lifetime. At the hearing of this issue, the psychiatrists for the prosecution and defence both agreed they had never before known a child this young be a witness in a trial. This argument did not succeed and she was called as a witness, to be cross-examined after her ABE was played.

Cross-examination of any child witness is difficult but this was exceptionally so. It was widely reported after verdict that she was in fact the youngest witness ever to have given evidence at the Old Bailey in a trial. She had first complained to a foster carer and subsequently to a child psychiatrist, but in the meantime had denied any abuse to the investigating police. When confronted in cross-examination with this denial a month after the first allegation, the girl accepted that she had told the police the truth, yet in re-examination, she maintained the inconsistent account in the ABE was also true. Although the judge reviewed the issue of competence at the end of the prosecution case, as *Powell* (above) suggests he should, he again concluded she was competent, her reliability being a matter for the jury.

There was no criticism by the judge or the prosecution of the cross-examination of the young girl, but even so there has been a great deal of comment since the case about the treatment of child witnesses and, coincidentally, the NSPCC has just published a report on this very topic: researchers interviewed 182 children, aged five to 19, parents and witness support professionals.[16] It is worth bearing in mind that many defendants are in the same age group, so the NSPCC strictures apply as much to those who prosecute as those who defend. For this reason, the CBA provides regular training in the proper cross-examination of young witnesses.

15 [2006] Cr.App.R. 31.

Publicity from first trial

A further difficulty was the blaze of publicity following the end of the murder trial. There had been a ban on reporting the names of the defendants or the victim but those orders had been flouted on the internet where the names were widely known. At the competence hearing, the defence unsuccessfully argued for a stay on the ground that no fair trial was possible because of the publicity.

In selecting the jury, it was agreed between the parties that certain potential jurors would be excluded (social workers, child protection workers, police CPS) but even so, how could the jurors fail to connect the defendants with the earlier trial? Asking them if they knew the names of the defendants would excite the very interest we were trying to avoid.

Not in our name

In the end the solution was as simple as it was ingenious: the prosecution suggested the defendants be tried using false names. The defendants readily agreed: limited research at court revealed no power to order it but, equally, no power to prevent it if there was agreement. There was thus no need to ask the jury any questions about their knowledge of the defendants. Only the surnames were changed; the correct forenames were used to avoid confusing the child, who was not to be told of the device.

As the trial had originally been listed to start mid-week, the court list already showed their true names: the trial was adjourned to the following Monday so a fresh panel could be used. That panel was kept separate from all the other jurors at all times. The names on the court list had to be changed and public announcements used the pseudonyms. After the verdicts were given, the jury were told that the defendants had been tried under assumed names and why.

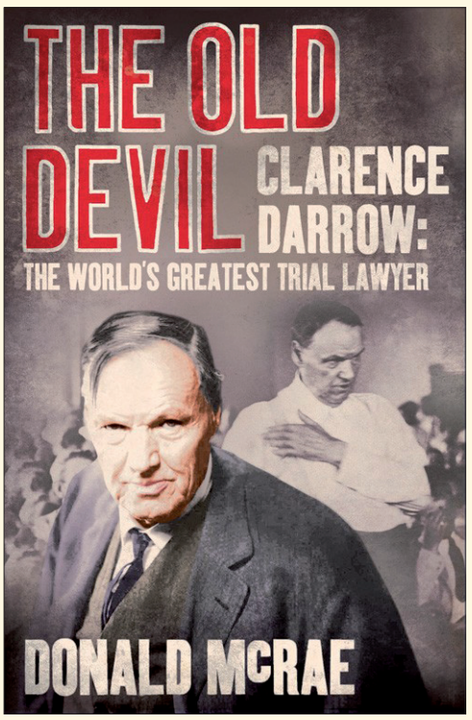
The boyfriend was convicted of the rape while the mother was acquitted of the cruelty count. The differing verdicts suggest that being tried under an assumed name did work, and it is a useful ploy in cases where there has been publication of inadmissible material. It remains to be seen if it can be used where there has merely been extensive pre-trial publicity, or ordered where the parties do not consent.

Paul Mendelle Q.C. is a barrister at 25 Bedford Row.

16 The report *Measuring Up?*, co-funded by the NSPCC and Nuffield Foundation, is the largest, most in-depth study yet conducted of young witnesses' experiences in England, Wales and Northern Ireland.

CLARENCE DARROW—THE WORLD'S GREATEST TRIAL LAWYER?

Donald McRae makes the argument



If he was at work in Britain today, rather than at his compelling peak in America in the mid-1920s, Clarence Darrow would be laughed out of court. In contrast to the measured and nuanced delivery of the modern British barrister, the legendary American courtroom bruiser relied upon soaring oratory and a theatricality that would seem outrageous in a contemporary setting. And yet, for all the melodrama, Darrow remains one of the most riveting figures in legal history.

Darrow would often be so moved by his own words that, with tears rolling down his face, he looked as if he had lived through the same anguish as the defendants. Yet he was a master at establishing a context of forgiveness in which to defend his clients. Hate the sin, Darrow always said, but never the sinner. On the page it looked a simplistic philosophy but, in the steaming old courthouse, his eloquence snared juries and saved lives.

Sixty-five years ago, in 1924, the battered 67-year-old lawyer agreed to represent Nathan Leopold and Richard Loeb, two teenagers who had confessed to the world's first "thrill-killing" in Chicago. He confronted seemingly insurmountable odds, and the boys faced certain execution, in The Trial of the Century. Darrow did not know it then but he was about to plunge into an extraordinary trilogy of cases which, over the next two years, sealed his legacy.

Following his eventual rescue of Leopold and Loeb from death-row, he defended John Scopes and Ossian Sweet. Scopes was charged with the "crime" of teaching evolution in Dayton, Tennessee—and the resulting "Monkey Trial" became another iconic legal battle. Three months later Darrow led the defence of Sweet, a black doctor, and 10 other "Negroes" on a joint charge of murder after they had been attacked by a white lynch-mob. The Sweet home had been surrounded by an angry, stone-throwing crowd after the doctor dared moved his young family into a white neighbourhood. Shots were fired from the house in self-defence and one of the white mobsters was killed.

Michael Mansfield, the esteemed British barrister who defended the Guildford Four and Birmingham Six, and more recently the families of Stephen Lawrence and Jean Charles de Menezes, agrees,

> "these three trials were so vast in scope, and so significant in their impact, that Darrow's work remains inspirational. In each trial he showed a fascinating mix as a man of reason who used such emotion in court. Judges here call my performances histrionic – but it's nothing compared to Darrow. It's little wonder we're still talking about him decades after his death [in 1938]."

Far more significant than the Hollywood movies they inspired—from Hitchcock's *Rope* to Orson Wells in *Compulsion* to Spencer Tracey in *Inherit the Wind*—Darrow's last three major cases saw him lead pioneering campaigns against capital punishment, creationism and racism, while setting precedents in using psychiatric profiles and expert witnesses.

The trial of Leopold and Loeb centred on his most passionate cause—overcoming the death penalty in a perplexing case. As part of a surreal sexual pact Leopold and Loeb had killed a 14-year-old boy, Bobby Franks, "for the thrill of it". After their arrest the 19-year-old Leopold stunned reporters by suggesting,

> "The killing was an experiment. It's just as easy to justify such a death as it is to justify an entomologist killing a beetle with a pin."

Loeb, 18 and better-looking, but not as well-read, smirked that, "This thing will be the making of me".

He was partially right. America was fixated by the case—yet the public thirst for execution was so intense that individual citizens stated their credentials as hangmen. A pensioner from Michigan offered $100 for the privilege of hanging Leopold and Loeb. "I am 66 years-old, but I am game."

Darrow resolved that, rather than claiming to be "not guilty" on the basis of diminished responsibility, Leopold and Loeb would admit their guilt and so avoid a trial by jury. He would then stress to the judge that, if spared execution, his clients did not expect to be released from prison. His plan was fraught with risk—for Darrow needed to make judicial history by persuading the court that mental illness should be regarded as grounds to commute the death penalty.

Mansfield acknowledges Darrow's groundbreaking work. "With the Tottenham Three [wrongly convicted of murdering PC Keith Blakelock in 1985]," Mansfield remembers, "we struggled to persuade the court of appeal that judging mental vulnerabilities, opposed to insanity, should include expert evidence. So it's startling that, in 1924, Darrow opened the door to expert psychiatric evidence. It was a seminal moment."

Until then US legislation operated in black-and-white parameters that did not recognise shifting gradients of mental illness.

The accused was either sane or insane. As psychiatry was not considered a medical science in legal circles, Darrow waged battle for two days over this issue—before convincing the judge to set a precedent and allow expert witnesses. Their psychiatric insights allowed Darrow to produce a remarkable closing address spanning three days.

"Why did they kill little Bobby Franks?" he asked. "Not for money, not for spite. They killed him as they might kill a spider or a fly. They killed him because they were made that way – because somewhere in the infinite processes that make up a boy something slipped."

Darrow's voice cracked in a hushed court. "I can picture them," he said, pointing at the suddenly frightened defendants, "wakened in the grey light of morning, furnished a suit of clothes by the State, led to the scaffold, their feet tied, black caps drawn over their heads, stood on a trap door, the hangman pressing a spring so it gives way under them. I can see them fall through space – stopped by the rope around their necks."

On the third day Darrow thundered with desolation and, at last, hope.

> "Through history you can trace the burnings, the boiling, the drawing and quartering, the hanging of people in England at the crossroads … I am begging this court not to turn backward to the barbarous past. I am pleading for the future … when hatred and cruelty will not control our hearts, when we can learn that all life is worth saving; that mercy is the highest attribute of man."

Darrow's eyes moistened when he saw that Judge Caverly was crying. They were silent tears, but powerful enough to alter the shape of the judge's twitching mouth. Leopold and Loeb were spared the death penalty—and sentenced instead, at Darrow's request, to life imprisonment.

Darrow was hailed by Variety as "America's greatest one-man stage draw" after his next case, the following summer, saw him face down religious fundamentalism. In defending John Scopes, Darrow stood up to the wrathful Christian right, represented by the former Democratic presidential candidate, William Jennings Bryan, who led the prosecution. Bryan warned, "if evolution wins, Christianity goes". Darrow responded forcefully:

> "Scopes isn't on trial. Civilization is on trial. The prosecution is opening the doors for a reign of bigotry equal to anything in the Middle Ages."

The showdown could only be resolved by a crushing cross-examination from Darrow—who surprised everyone by calling Bryan to the witness stand. He dismantled the pompous politician, ridiculing his denunciation of scientific fact in favour of biblical allegory. Bryan, like the class dunce, finally shook his head.

> "I do not think about things I don't think about."

HL Mencken, the celebrated columnist, mocked the vanquished Bryan:

> "This three-time candidate for the Presidency came in a hero and he sat down as one of the most tragic asses in American history."

At the end of that same week, after the charge against Scopes dribbled away, Bryan suffered a massive stroke and died. "There's a rumour about town," Scopes wrote, "that 'the old devil Darrow' killed Bryan with his inquisition."

Three months later, in October 1925, Darrow set out to save Ossian Sweet and his family. "The Sweet case," Mansfield says, "carries most resonance for me. It reminds me of the Stephen Lawrence inquest because two decent black families faced similar difficulties. There was extraordinary racism in the Lawrence case – even if it was not as naked as that in Detroit. But I love the way Darrow mixes serious political points with edgy humour. Pure pugilism doesn't work in court because it makes people switch off – he taught us that truth."

Darrow presented a stark contrast between the cultured Sweets and the racists who attacked them. The attorney remarked that Dr Sweet had studied under Marie Curie in France and he was, at the very least, equal to his white neighbours. "You live near which street?" Darrow asked a white school-teacher in the dock.

"Go-thee," Marjorie Stowell answered.

"What!" Darrow exclaimed, knowing she meant Goethe Street. Unlike his neighbours, Darrow confirmed, Sweet knew Goethe was one of the greatest writers in European history. "If they had one black family up there some of the neighbours might learn how to pronounce 'Goethe.'"

Another witness, Edward Miller, admitted threatening the Sweets because, "We wanted to protect the place against undesirables …"

"Like who?"

"Negroes," Miller conceded.

"Anyone else?" Darrow asked.

"Eye-talians," Miller grunted. They didn't want "anybody but Americans" living in their neighbourhood.

Did Miller not know that "Negroes" had lived in the country for 300 years? Did he not know that America, at least for white-skinned people, had been "discovered" by an Italian?

Darrow was magisterial when exposing such racism—prompting Sweet to say,

> "I faced the same mob that had hounded my people through its entire history. I was filled with a peculiar fear, the fear of one who knows the history of my race."

Inspired by that lucidity Darrow asked the white jurors questions which made them gasp. "If you had a choice," he murmured, "would you lose your eyesight or become coloured? Would you have your leg cut off, or have a black skin?"

During his closing address Darrow's words rang out, as they had done for so many decades, in defense of the accused. After seven hours he bore down on the jury one last time: "I ask you in the name of progress and the human race to return a verdict of 'Not Guilty'".

A day later the jury foreman, George Small, paused when asked if they'd reached a verdict. "Yes," he said, before crying out, "*Not guilty!*"

Darrow, dramatically, almost collapsed. The prosecution lawyer, Robert Toms, rushed to catch him but Darrow, eyes glinting darkly, laughed: "I'm all right. I've heard that verdict before."

Donald McRae's *The Old Devil: Clarence Darrow, The World's Greatest Trial Lawyer* is published by Simon & Schuster.


Sian Busby

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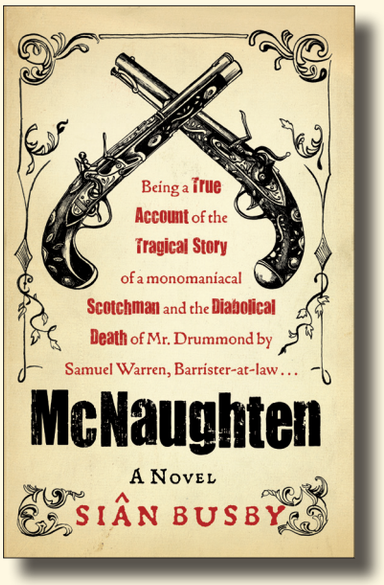
WAS M'NAUGHTEN INNOCENT?

Sian Busby explores this famous case



Forget everything you thought you knew about the circumstances attending the formulation of the M'Naghten Rules, for it is almost certainly wrong.[1] This strange tale (in which, perversely some might think, the lawyers emerge as heroes) is a crooked consequence of confusion, deliberate obfuscation and dismal misreporting. Despite a (literally) smoking gun and a suspect taken in *flagrante*, the eponymous case is far from open and shut; rather it is one of the best examples of history as a game of Chinese Whispers.

Let us begin with what can be stated as *fact*. At about 4pm on Friday 20th January a young Glaswegian wood-turner, Daniel McNaughten, fired a pistol at Edward Drummond, private secretary to the Conservative prime minister, Sir Robert Peel. The shooting occurred in broad day, on a crowded street outside the Salopian Coffee-house which stood at the Charing Cross end of Whitehall (the Cabinet Offices now occupy the site), directly opposite Scotland Yard. Five days later, Mr. Drummond (who had been on his way to 10, Downing Street— a few yards away) died.

McNaughten stood trial for murder and was defended by a team led by Alexander Cockburn, Q.C., one of the greatest legal minds of his generation (although few people thought so at the time). Found to be not guilty on the grounds of insanity, he was sent to Bethlem where he remained until being transferred to the newly-opened Broadmoor Hospital for the Criminally Insane in 1863. He died there a little over two years later.

The case had been a sensation, the verdict controversial—to say the least. A great outpouring of moral outrage ensued: McNaughten was bad, rather than mad; liberal lawyers and progressive madhouse doctors had helped a Terrorist escape justice; no person of status was safe. Queen Victoria (who had herself been fired at twice in recent months) commanded the government to do something. The House of Lords duly put five questions concerning insanity and the law to twelve judges of the Queen's Bench. Eleven of the judges responded with four "answers", which have since become known as the M'Naghten Rules.

This is as much as can be stated with any certainty. Of the two most salient "facts" of the case—namely, (1) McNaughten mistook Edward Drummond for the prime minister, Robert Peel, and (2) McNaughten was suffering from some sort of delusional disorder of a persecutory type—there was never any firm proof of either. By dint of having been so oft-repeated, they have acquired a sort of mythological truth, nothing more.

In respect of (1), as we shall see, the origin can easily be traced. As for (2), it is doubtful (almost 150 years post mortem) that the truth will ever be determined. "Psychiatry" did not exist in 1843; indeed it was only 30 years before that Bethlem inmates had been kept enchained upon filthy straw—the treatment of those incarcerated in many county asylums and workhouses (the last resort of pauper lunatics) had improved little in the intervening period.

Cockburn's use of expert testimony was certainly groundbreaking, but it is true to say that the diagnostic methods of the eight alienists who testified for the defence would not meet modern standards. Two of the witnesses had never even examined McNaughten. Other medical experts (and the governor of Newgate gaol) believed the insanity was feigned—a view shared by a vengeful media and general public. McNaughten's clinical notes from Bethlem depict a non-violent, temperate and shy man, who never exhibited any outward signs of the "chronic mania and dementia" with which he was supposedly afflicted.

Cockburn argued persuasively that his client was suffering from a "partial insanity"—"monomania"—a cutting-edge diagnosis in the 1840s. This allowed for the apparent loss of all self-control in respect of one "powerful delusion" in an individual who was, in all other respects, of sound mind. In McNaughten's case this "powerful delusion" was of a persecutory nature: he believed that the Tories were his mortal enemies.

At his Bow Street arraignment the morning after the shooting (when Mr Drummond's doctors were still confident that their patient would recover) McNaughten told the magistrate that the Tories of his native city had compelled him to fire the pistols. "They follow me wherever I go," he said, in the only public statement he ever made.

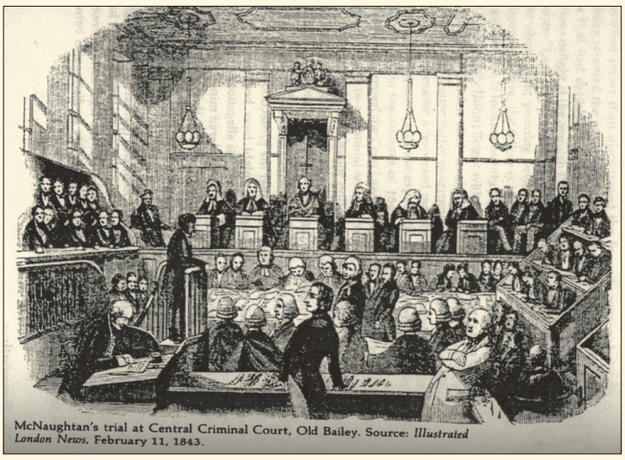
> "I can get no rest from them night or day ... They have done everything in their power to harass and persecute me; in fact, they wish to murder me. It can be proved by evidence."

Ironically, the statement not only supplied the glimmer of mitigation, it was to be the foundation of the prosecution case. McNaughten was politically motivated, and it was the life of Sir Robert Peel that he desired. The Drummond family were publicly reporting that this was a case of mistaken identity within a day or two. By the time that Sir William Follett, for the Crown, assured the Old Bailey jury that he would satisfy them of the same, the suspicion had become the self-evident truth of the matter. Indeed, in the complete absence of any other motive, it was the most plausible explanation.

The Tory government in 1843 was one of the most unpopular in history; Sir Robert Peel, a national hate-figure. The country was in

1 Not even the spelling of the plaintiff's name has been agreed upon. I have opted for the spelling used most often at the time, but there is some evidence that the protagonist may have preferred the somewhat unusual McNaughtan. The rendering M'Naghten—that favoured by most legal considerations of the subject, including, of course, the famous Rules—is, needless to say, the least correct.

the grip of a protracted economic depression, exacerbated by the failure of two harvests. Many people were at the edge of starvation (McNaughten's native Glasgow, and its neighbour Paisley, were among the worst affected places). Chartism and the Anti-Corn Law League were at the vanguard of a great press of popular dissent, prompting violent uprisings throughout the country.



McNaughtan's trial at Central Criminal Court, Old Bailey. Source: *Illustrated London News*, February 11, 1843.

Peel had reintroduced income tax at 7d in the £; he had overseen a brutal suppression of political radicalism; and although he had reduced duties on some luxury items, he had not repealed the Corn Laws. The middle classes were inflamed. By effectively prohibiting the import of cheaper foreign grain, the Corn Laws inflated the domestic price. They represented all that was gross and corrupt in a system that served the landed interest at the expense of everyone else. As more and more people starved, Peel found himself the object of death threats.

It did not take long for the Anti-Corn Law League to be implicated in the shooting of Mr Drummond. The Home Secretary had, for several months, been ascertaining the names of all the members of the League and scrutinising their acts. When a respectable-seeming, apparently successful Scottish tradesman shot the prime minister's private secretary, and then spoke in court of Tory harassment, it was a straightforward matter of putting two and two together. Although, as *Era* Magazine informed its readers, "no clue had been discovered of any inducement, no trace found of any instigators," Thomas Carlyle was confidently writing to his mother within a week of the shooting, that McNaughten had "confessed" to the attempted assassination of the prime minister and was "a fanatic for Corn-Law repeal".

The fact that McNaughten was in possession of a large sum of money (£750 a sum equivalent to tens of thousands in today's money) added to the suspicions proliferating about him. Carefully worded insinuations began to appear in newspaper reports. It was "well-known" that the League had a great deal of cash at its disposal, and employed "lecturers" at £300 a time. Peel told Queen Victoria that McNaughten was "exactly the instrument which others might employ".

In fact, as *Era* reported, despite an extremely thorough police investigation (including testimony gathered by a Scotland Yard New Detective sent to Glasgow the day after the shooting), there was no evidence whatever that McNaughten was in the pay of the Anti-Corn Law League or any other political group or party. Any such discovery would have formed the basis of the Crown's case, with a very different outcome for McNaughten and insanity defence jurisprudence. A close study of McNaughten's bank records indicates that the £750 was most likely his life's savings (he had been working since he was seven years old).[2] A note in the Police file at the National Archive makes an informed comment upon his frugality.

And yet the Prosecution persisted in arguing a political motive. The entire case hinged upon the testimony of a Metropolitan Police Inspector, John Massey Tierney, who claimed to have conducted an informal interview with McNaughten within a few hours of his arrest. When he inquired whether the suspect knew who it was he had just shot at, McNaughten allegedly replied: "It is Sir Robert Peel, is it not?"

Tierney did not attend the first examination at Bow Street, and there is no record of the interview in the police files at the National Archive (he claimed to have informed the Police Commissioners by way of a private report which cannot be traced). He was dealt with brutally by Cockburn, who denounced him in the Old Bailey as "an inquisitor and a spy". Tierney was part of an elite corps of Metropolitan Police deployed (under Home Office orders) to assist provincial magistrates in the containment of political insurgency. A good deal of this work involved trumped-up charges, surveillance and bribery. It was also very lucrative: in 1844 Tierney wrote to the Carmarthen bench asking for £260—his reward for "breaking the neck" of Rebeccaism.

The extent of the spy network in those turbulent times was well-known and commented upon, and lends to McNaughton's recondite statement a degree of reason. After all, as the joke goes, just because you're paranoid it doesn't mean that they aren't out to get you. Cockburn, wisely no doubt, kept politics out of the matter, opting for a perhaps more high-risk strategy with a Great Cause adhering to it. The insanity defence was widely held to be a defective legal mischief, affording bad and cunning people a large measure of impunity: the corollary of which was that the mentally ill were not necessarily spared the full penalty of the law. Cockburn's defence of McNaughten, brilliant though it was (and the more so given that he had less than a month to prepare), urged debate and much-needed clarification. It also, of course, made the Q.C.'s reputation.

McNaughten was spared the gallows and consigned to the obscurity of the madhouse, but did he in fact get away with murder? There are doubts and vagaries concerning the shot, the pistols, and even the precise cause of Mr Drummond's death. Drummond's nephew, who saw the victim a few minutes after the assault, observed a small burn in his uncle's clothing which he did not think had been made by a bullet. The three society doctors who attended Drummond did not think, initially, that he had been badly injured. McNaughten, at his Old Bailey arraignment, told the judge that he was guilty only of "firing the pistol".

After a day and a night in which the doctors fished unsuccessfully for the piece of shot in the gentleman's behind, removed another discovered in his front, and partook of various blood-lettings and other interventions—all without the benefits of anaesthesia or basic hygiene—Mr Drummond declined rapidly. Doubts were raised by jurors at the coroners' inquest; the surgeons were questioned as to the manner of treatment; a contemporaneous pamphlet posed the (rhetorical) question: "What Killed Drummond, the Lead or the Lancet?"

The mystery endures: an ever-timely lesson from history in the dangers of jumping to conclusions. In the thick undergrowth of interests, fear and cries for vengeance that ramify about a perfect sensation, the most implausible explanation may yet turn out to be the only probable.

Siân Busby's book *McNaughten—A Novel* is published by Short Books.

2 The money, some £200 of it, eventually went towards McNaughten's defence.


Robert Banks

SENTENCING UPDATE

Robert Banks considers recent sentencing changes

Drug offences

The Sentencing Advisory Panel has issued a consultation paper on drug offences. The Panel consider that imprisoning drug offenders for relatively substantial periods does not appear to represent a cost-effective response. Furthermore, particularly long custodial sentences for the purposes of deterrence are not the most effective sanction in view of the availability and potential impact of confiscation orders. It is also considered that sentences should be reduced. The suggested sentencing range for those playing a leading role in importing between 2.5 kilos and 20 kilos of heroin or cocaine is 10–14 years. For those playing a significant role the range for those amounts is 6–10 years, and for those playing a subordinate role the range is 2–6 years. Further, it is inappropriate for purity to be a significant factor in determining seriousness in most cases. It will be particularly disappointing to many that the Panel seek to equate heroin and crack cocaine with ecstasy in terms of seriousness.

The ministerial view remains very important to the Sentencing Guidance Council and it would appear these proposals are unlikely to be accepted (and certainly not before a general election). However, the Panel's approach that couriers should be treated less seriously than now will be welcome. Concern has always been expressed at the futility of long sentences for couriers from poor countries with family commitments who are ignorant of the penalties they face.

Attempted murder

The Sentencing Guidelines Council has issued a definitive guideline on attempted murder, (see *http://www.banksr.com* Guidelines tab). Attempted murder cases are divided into three groups. They are:

Level 1 Those where if the defendant had been convicted of murder the offence would come within the Criminal Justice Act 2003 Sch.21 para.4 (whole life cases) or para.5 (murder with a firearm, for gain, or of a police or prison officer on duty, a murder which is racially or religiously aggravated, or one involving sexual or sadistic conduct, etc.).

Level 2 Other planned attempts to kill.

Level 3 Other spontaneous attempts to kill.

Each level is divided into three subdivisions:

(a) Serious and long-term physical or psychological harm;

(b) Some physical or psychological harm; and

(c) Little or no physical or psychological harm.

The starting points for Level 1 are 30, 20 and 15 years. For Level 2, the starting points are 20, 15 and 10 years. For Level 3, the starting points are 15, 12 and 9 years.

There are five aggravating factors and four mitigating factors.

The effect of these guidelines will be increase the sentences for attempted murder and to end the current judicial exercise of starting with a consideration of the likely sentence the defendant would receive if the charge had been murder.

Diminished responsibility

In *R. v Wood (No.2)* 2009 EWCA 651, the Lord Chief Justice and four judges considered sentencing in diminished responsibility cases. The Court held that neither the assessment of the seriousness of any offence to address the offender's culpability nor the harm consequent on his actions were paramount and they were not exclusive considerations. They disagreed that the assessment of the seriousness of the offence of manslaughter on the grounds of diminished responsibility must be focused exclusively on the defendant's culpability. They considered that although the appellant's culpability was diminished, it was very far from extinguished, and a very substantial element of mental responsibility remained. The risk represented by the appellant had not yet diminished. Where diminished responsibility is established it serves to reduce the defendant's culpability for his actions when doing the killing, but the remaining circumstances of the homicide are unchanged. Specific features of the seriousness of the homicide, for example a double rather than a single killing, or the sadistic killing of a child, may be common both to murder and diminished responsibility manslaughter. At the same time, the mitigating features expressly identified in


Royal Courts of Justice

Sch.21 extend to what may approximate but not amount to the defence of diminished responsibility and provide an additional connection between the Schedule and the defence. Finally, the culpability of the defendant in diminished responsibility manslaughter may sometimes be reduced almost to extinction, while in others, it may remain very high. Accordingly, when the sentencing court is assessing the seriousness of the offence with a view to fixing the minimum term, subject to the specific element of reduced culpability inherent in the defence, the assessment of the seriousness of the instant offence of diminished responsibility manslaughter should not ignore the guidance. Indeed, the link is plain. A vast disproportion between sentences for murder and the sentences for offences of manslaughter which can sometimes come very close to murder would be inimical to the administration of justice. At the lowest, this means that the actual sentences imposed in cases of diminished responsibility manslaughter decided before the 2003 Act came into effect should be treated with the utmost caution. The decisions may helpfully point to relevant broad considerations, but the actual sentences themselves no longer provide an accurate guide to the level of minimum term sentences to be imposed now. The legislature has concluded, dealing with it generally, that the punitive element in sentences for murder should be increased. This coincides with increased levels of sentence for offences resulting in death, such as causing death by dangerous driving and causing death by careless driving. Parliament's intention seems clear: crimes which result in death should be treated more seriously and dealt with more severely than before. Our conclusion is not governed by, but is consistent with this approach.

I consider that this means that in most diminished responsibility cases the sentences will be longer than before and there will be a closer link between the sentences for a comparable murder and manslaughter based on diminished responsibility.

Insider dealing

The Lord Chief Justice has given guidance on insider dealing in *R. v McQuoid* 2009 EWCA Crim 1301. The principles to be applied were laid down and an eight-month prison sentence for a solicitor involved in an illegal share purchase making nearly £49,000 for himself and another was affirmed.

Youth justice

The Sentencing Advisory Panel has issued its advice to the Sentencing Guidelines Council concerning Sentencing Principles—Youths. Most of their recommendations are non-controversial. However, many will consider the approach is over prescriptive in an area where judicial discretion is very important.

Overall changes

Familiar trends are continued by the Court of Appeal since the new Lord Chief Justice was appointed. Leave to appeal remains difficult to obtain. Emphasis is made that each case is fact specific. The court wants succinct grounds and skeletons and does not want the advocacy to repeat the grounds. The court is only interested in the key points. Although the Court will have regard to the guidelines, the key issue will be to stand back and consider just whether the sentence is manifestly excessive, not whether it is inside or outside of the range in the guidelines. Judgments are shorter. The Court is keen to advertise that defendants who pursue hopeless appeals will have orders that days will not count made.

In the past, sentences were reduced because of remarks made by the judge even though the sentence did not appear excessive. This sort of approach is unlikely to reoccur. The sole issue is whether the sentence is unlawful or manifestly excessive.

For further updates see *http://www.banksr.com* Update tab.

Other guidelines

It is anticipated that:

1. the Fraud definitive guideline will be issued in late September or early October 2009;
2. the Sentencing of Youths definitive guideline will be issued in early November 2009;
3. there will be no other definitive guidelines this year; and so
4. the Drugs definitive guideline will be issued sometime next year.

Robert Banks is a barrister and author of *Banks on Sentence*, the new edition has just been published.

NOTICES

NEW CENTRE FOR CRIMINAL LAW ANNOUNCED AT UCL

The Faculty of Laws at University College London is establishing a new Centre for Criminal Law, with Professor Ian Dennis as its Director. The aims of the Centre are to promote teaching and research in criminal law and criminal justice through the organisation of research programmes, conferences, seminars, lectures and courses. Its work is intended to appeal broadly to all with a professional interest in criminal justice, including academics, practitioners, the judiciary, policymakers, the police, CPS, and so on. More information about the Centre and its activities is available on the UCL website:

http://www.ucl.ac.uk/laws/criminal-law/.

The formal launch of the Centre will take place on Tuesday October 27, 2009 at an evening event at UCL. Professor Andrew Ashworth will deliver a keynote address on the theme of risk, and risk management, in criminal law. This will be followed by a panel discussion and a reception. Readers of the Criminal Bar Quarterly are warmly invited to attend this event, which is free of charge. It is intended that CPD points will be available. Places may be booked online at

http://ucl-criminal-law.eventbrite.com.

YOU ARE NOT ALONE

More musings from David Etherington Q.C.


David Etherington Q.C.

I little thought I would ever describe the death of a pop idol as a seminal event, ranking alongside those of President Kennedy and the Princess of Wales. And yet … the death of Elvis Presley and the murder of John Lennon should probably have occurred to me. Perhaps it was the fact that, as with the movies, the age of *the idol* seemed to have passed. There are so many sources for our attention nowadays: diversity of talent some might call it; or others, a lack of focus and authoritative judgment.

The death of Michael Jackson has proved to be such an event, disproving, once again, Margaret Thatcher's (apparently misquoted and misunderstood) dictum that there is no such thing as society. The violent twitch upon the human thread that occurred in the early afternoon of Thursday, June 25, 2009 in California produced that strange phenomenon of shock, disbelief, conspiracy theories, grief and guilt. Guilt … somehow we were complicit in the death of Peter Pan. Like Peter Pan, Jacko was a flawed figure. Events that criminal practitioners know only too well lead to the most rational and irrational human hatred, where the concept of innocence until guilt is proved goes by the board even amongst supposedly intelligent human beings, damaged Michael Jackson but they failed to destroy him—except, perhaps, within himself.

Jackson's death also served to illustrate less attractive features of our culture: the curse of rolling news channels who need the news instantly to avoid the repetitive dirge of rehashed film footage, speculation and those experts in everything who are so readily available to appear at a moment's notice to opine on that which lacks hard facts. Toxicology that might take eight weeks … the very thought of it. Indeed, the recent restrictions on news reporting in Iran seem themselves to frustrate the news gatherers less because of what they portend for that ancient civilisation than because it interrupts the instant 24-hour news process.

This vice is not restricted to news journalists: drama, too, is less prepared cope with restrictions necessarily imposed by dull reality. It would be such a shame to spoil a good film with accuracy. This is not new. *In the Name of the Father* was ruined for me by Emma Thompson's impassioned plea in the Court of Appeal, sadly not in reality delivered by the character whom she was playing because of those old closed-shop rules about barristers and solicitors. In how many films with English court scenes have barristers wandered around courtrooms, eyeballing witnesses, in a supposed imitation of US practice, although, in fact, static advocacy is the norm in a number of American jurisdictions. Or witnesses, about to give key evidence in criminal trials, given "Point of View" camera shots in the well of the court when, as we all know, they would have been in the separate room often inconveniently far from the courtroom.

It would be foolish to become silly and pedantic about some of these errors. A film may be a good film despite dramatic licentiousness. Compare Patricia Highsmith's *Strangers on a Train* with Alfred Hitchcock's film of the same name. Although the plots have substantial similarity, they are, in reality two different stories. Highsmith's depiction of the morally ambiguous hero drawn into a murder pact because of weakness, ambition and moral vacillation is contrasted with Hitchcock's noble hero driven by fate and a forgivable amount of hesitation (Hitchcock was never entirely black and white if you will pardon the pun) pitted against the mentally unstable mummy's boy with a barely disguised attraction for him and a deep Freudian desire to kill his own father. Both are great works in their own right.

When it comes to television drama, however, it seems to me that different rules apply. Unless there is a "what if …" thesis governing the drama or the series, take *Judge John Deed* for instance, then surely some thought has to be given to what happens if the production veers away from basic realities simply because they are inconvenient. Apart from the broadcast being incredibly irritating to viewers who have some knowledge of the facts, they are also potentially extremely misleading to those watching. In other words, you have to trade on equal terms. If the work is plainly departing from an accurate depiction of its factual subject matter, such as in comedy, then a wide margin of appreciation will be given for it—although even then, there is a certain level of realism that needs to be maintained, dependent on the genre involved. *The Six Wives of Henry VIII*, *Henry VIII* and *Carry on Henry* are three quite different productions.

Young television people have a problem with our "divided" legal system. It prevents those "CSI"-style series from being convincing—efforts to make the CPS seem sexy and dangerous are bound to be a touch farcical even with the permitted dramatic licence allowed to all productions.

Worse still, our masters seemingly suffer from the same drift. Professions require the appropriate professional to use his or her skill and knowledge, training and governance, to perform to the best of his or her ability the requisite professional tasks. No fudge of words or need to protect self-imposed budgets or current political imperatives can ever justify the damage to any profession by the wrong person performing a function properly reserved to another. It has as hollow an effect as those organisations which tell us they are "committed" to doing something which the facts tell us have not been, and, in all probability, are not being, done. Nor is it an answer to show that you sometimes get away with it. I am sure the usher could get away with being the judge on occasions, some might do some parts of the job very well, but that would not justify the step. And, please, Lord Bach … this is just a *reductio ad absurdum* to make a point—not a suggestion worthy of a working party, focus group or consultation.

Our focus on increasing opportunity and diversity is in every sense admirable, unless professional standards are diminished. After all, we might all feel happy if young people we knew and liked got into, say, medical school by lowering the bar just a tad—even if they were not quite of the desired standard. Would we be just as happy, 20 years later, to see one of them on our doorstep in the middle of the night when a loved one lay critically ill?

Perhaps it is time, before it is too late, to think as a society whether we have not allowed our demands for instant answers, for seeing what we want to see rather than what is, for putting expediency above principles and for prioritising short-term needs (often fuelled by the other demands) to cause irreparable damage to proven professional standards and skill. We are so concerned to be busying ourselves about the collateral and the peripheral that we are missing the centre and the essence. And if Mr Jackson, now lying somewhere for experts to prod and probe in the name of "answers" and deflect us from the real answer as to why he is there, gives us a brief opportunity as a society to ask whether this is truly the world we want, then it will be one more service that the extraordinary life of that frail creature has given us. As a profession we are not alone, and we are better, wiser more confident and less prepared to be bullied and demeaned when we remember and act upon it.

David Etherington Q.C. is a barrister at 18 Red Lion Court.

ASBO: BURDEN OF PROOF ON BREACH


Abigail Bright

Abigail Bright considers the latest authority

The appellate decision in *Charles* (Thomas L.J., Wilkie and Dobbs JJ.) iterates the point of principle behind the JSB guidance on prosecutions for alleged breaches of ASBOs. That guidance unequivocally states that it is for the Crown to wholly discharge its case, for the purposes of s.1(10) of the 1998 Act, on the criminal satisfaction of proof. Once a defendant simply raises the issue of his having a reasonable defence to the s.1(10) offence, there is no further burden or onus on him. The *Charles* appeal arose in ignorance of that guidance, suggesting practitioners should apprise themselves of what was intended by the JSB—and was accepted "without doubt" by the appellate court—as a definitive statement on proving breaches of s.1(10).

Affirming JSB guidance on ASBOs

Charles is an unusually succinct case. Its length belies its practical and evidential significance. Charles had been convicted for an offence under s.1(10) of the Crime and Disorder Act 1998, for breach of his three-year post-conviction ASBO. The judge had summed up on the basis of having deciding that the defence had the legal burden. The live point of appeal turned on "whether the legal burden of proving whether a defendant acted without reasonable excuse rests upon the Crown or the defence".

As the appellate court observed (Thomas L.J. giving judgment), the point had already been available to the Woolwich trial judge, though his attention had not been brought to the *Guide for the Judiciary on Anti-Social Behaviour Orders* (third edition, 2007, published by the JSB). It was there stated that the burden of proof was the criminal one and that it rested with the Crown. Paragraph 6.5 of the Guide provides:

> "Proving a Breach of the Order
>
> The prosecution must prove a breach of the Order to the criminal standard. If the defendant raises the evidential issue of reasonable excuse it is for the prosecution to prove lack of reasonable excuse."

The result generated by the JSB guidance is clear in terms of its procedural application: it is not for the defendant to discharge any burdens associated with prosecution on the basis of s.1(10), other than merely raising the issue. The burden of proof lies with the Crown.

A defendant's "raising of the issue" can have a significant result

Nevertheless, evidence lawyers (and who among criminal practitioners can eschew being so graced?) may be rather excited by one aspect of the JSB guidance. Reference in the guidance to a defendant's raising the issue of reasonable excuse—correctly termed "the evidential issue" in the guidance; reference to "burden of proof" is not helpful for being unspecific and too general—relates to the requirement that a defendant must merely "raise the issue". This is effectively a threshold, prima facie requirement to state that there is sufficient evidence to entitle to be drawn in the absence of further evidence, though not compel a finding of, reasonable excuse. In practice, this is important: the operation of a defendant's "raising of the issue" has the specific, striking result of effectively offering proof, if the Crown is not able to adequately reply. "[S]uch evidence as, if believed and left uncontradicted and unexplained, could be accepted by the jury as *proof*" (*Murphy on Evidence*, citing *Jayasena v R.* [1970] A.C. 168, per Devlin L.J., at 624, my emphasis). Similarly operating evidential burdens are the defences of provocation and self-defence.

Charles on legal burdens—a timely, strong statement of principled reasoning

That the court in *Charles* considered the JSB guidance and commended it without reservation registers a coup for the JSB in terms of its profile and ascendancy. The court began from the position of considering "the correctness or otherwise" of para.6.5 of the Guide. As the JSB had done, the court drew on what it deemed the analogous decision in *R. v Evans (Dorothy)* [2004] EWCA Crim 3102, concerning s.5(5) of the Protection from Harassment Act 1997. In considering the propriety of the JSB guidance, the *Charles* court has provided a timely, careful reminder of the jurisprudence underlying the designation of burdens and proof in criminal matters. The *Charles* decision is, in this way, a journey back to first principles in stating what the court called "[t]he general approach". The court began with the pedigree principle in *Woolmington v DPP* [1935] A.C. 462: "the fundamental rule that the burden of proving a defendant's guilt rests upon the Crown". It noted "the limited exceptions" to *Woolmington*, confirming that those are either expressly stated by statute or else may be properly construed as capable of being read in.

Construction of s.1(10) of the 1998 Act

A reading of *Charles* suggests the court was concerned to remind (not least itself) of the line of principled reasoning justifying the *Charles* result of a quashed conviction. It considered that "observations … in accordance with principle" issuing from *R. v Evans (Dorothy)* were not only apposite but had an "even stronger" bite when applied to defendants faced with allegations of breach of s.1(10) of the 1998 Act. The court did not specify why, exactly, "even stronger" considerations applied in the one context and not the other. However, it seems, on a careful reading of the court's reasoning, that the feasibility of a reverse burden was not thought feasible for want of certainty as to the circumstances in which imposition of an ASBO is appropriate. This, coupled with uncertainty as to the kinds of conduct that would complete breach (or the offence) of s.1(10) of the 1998 Act, militated against a reverse burden. (Nothing turns on the point but this seems too partial an analysis: why does this criticism not pertain in the context of breaches of anti-harassment legislation? Both are criminal statutes.) At [14] of its judgment, the *Charles* court considered why, in fairness to defendants, a reverse burden could not operate. The court's comments read more generally as an

indictment of the legislature's ushering in of the legal consequences incumbent on breach of ASBOs:

> "Parliament did not specify the terms in which ASBOs were to be made where the breach of an ASBO was to be an offence under s.1(10). The terms of ASBOs were left to the courts. It is difficult to see how Parliament could have thought that there would therefore be that sufficient degree of specificity that is required. Experience has in fact shown that the terms of ASBOs are often far reaching or imprecise (despite the numerous authorities and guidance referred to in the Judicial Studies Board guide)."

"The effect of s.1(10) … was to make criminal actions that would otherwise not be criminal"

Those observations, it seems, were specific in the court's mind to the making (and supervision) of ASBOs, and not to proceedings appraising the liability of conduct in other contexts. The following nugget of reasoning can be lifted from *Charles* as a useful orientation in assessing whether anti-social behaviours (ought to) incur consequences in criminal law:

> "[A]s in this case, it is not an offence to behave in a way that causes another harassment, alarm or distress, unless that conduct amounts to an offence of harassment or some other offence; this appellant was not prosecuted for harassment, as that would have required a course of conduct. The act was not committed in a public place and so no public order offence arose. *The effect of s.1(10) in this case, as in many, was to make criminal actions that would otherwise not be criminal."* [emphasis added]

It was inconceivable, the court found, that *any* burden of proof should have been intended by the legislature to fall on the defendant. This was (at [16]) for the conjoined reasons that "s.1(10) … criminalises conduct that Parliament itself has not criminalised" and yet the legislature "ha[d] not prescribed the terms in which that can be done". The first of these reasons relates to the lack of specificity as to the kinds of conduct or behaviours associated with s.1(10) breach. This concern that there should be greater precision (or at least not striking imprecision) underscoring the behaviours falling foul of s.1(10) is hardly a new thought. The *Charles* court is, in advancing it, keeping company with a host of commentators. The point of criticism motivating the second reason appears less than clear in its terms, but it crystallises when confined to the court's earlier statement (at [15]):

> "There [is] no point in providing for a breach to be a criminal offence, if the conduct was otherwise criminal under other specific statutory provisions."

"The [1998] Act … imposes only an evidential burden on the defendant"

Perhaps unsurprisingly, though, having made these principled but rather general statements, the court itself preferred to move to the safer dispositive ground found in *Edwards* [1925] 1 Q.B. 27 and *Hunt* [1987] 1 A.C. 352. Those cases were recognised by the court as "general authorities", throwing light on construing a statute in the absence of an express provision for placing on the defence the burden on a particular issue. This was essentially a foray into the realm of statutory construction, applying the safeguards set out in those authorities. It seems to have been on this basis, emboldened by *Edwards* and *Hunt*, that the court arrived at its result:

> "The [1998] Act is perfectly workable on the basis that it imposes only an evidential burden on the defendant, but leaves the legal burden on the Crown." [At 16]

The court in *Charles* approved *R. v Nicholson* [2006] EWCA Crim 1518 in finding that "there was no material distinction between [s.1(10) of the 1998 Act] and s.5(5) of the Harassment Act 1997". *Nicholson* is directly in point, in that it concerned a case under s.1(10) of the 1998 Act and remitted what amounted to a reasonable excuse as a matter for the jury. The *Nicholson* court had followed *Evans*, in finding no significant difference between the 1997 and 1998 statutory provisions. This draws full circle to the JSB guidance, instructed as it was by the approach in *Evans*. The *Charles* court also thought it "interesting to note" (at [18]) that CPS guidance on the s.1(10) point, leaving to the jury what amounted to a reasonable excuse, had been correct. That guidance had been rejected by the trial judge as incorrect (the Crown having asserted it was correct). The court noted the happy marriage between this and the JSB guidance.

The appeal in *Charles* was allowed and the conviction quashed. A retrial was not deemed proportionate, although the basis for deciding this decision—costs, merits—was not supplied.

Conclusions from *Charles*: why the ASBO's hybrid model fails

Charles illustrates how easily, and at what point in practice, the so-called hybrid nature of the ASBO breaks down. It is "hybrid", in theory, because it is part-civil (in its imposition) and part-criminal (proceedings on breach). Whereas, though, an ASBO might be easily enough dispensed—and those individuals subject to it easily enough disposed—in the *civil* context (which is not to speak to objections in principle), there are special, more sensitively calibrated considerations in (and unique to) the criminal arena. Criminal law requires that any *sanctions* attaching to the completion of certain kinds of conduct are fairly and clearly stated in advance. Article 7 of the ECHR, the non-retrospectivity guarantee, secures this protection in criminal cases. A necessary corollary of this is that *those kinds of conduct tending to incur sanction* must also, further, be stated with a sufficient degree of specificity. Put simply: law must speak not only to the consequences on breach of a legal provision (say, s.1(10) of the 1998 Act), but also the kinds of proscribed conduct that will tend to complete that offence. As the court in *Charles* observed, breach of an ASBO will not invariably lead to completion of a criminal offence. The irresistible thrust of the judgment is that *mere breach of an ASBO* should not characterise the individual as criminal.

Charles is an important—dare we say final?—statement on a particular, practically significant aspect of enforcing ASBOs. The point on which it rules is limited to where the legal burden lies. Nonetheless, the reasoning of the court is a statement of wider significance for further legislative policy-making in this area. It represents a concerted effort to demarcate and fend off criticisms of ease of enforcement and lesser evidential requirements that some commentators recognised as having made the ASBO attractive to enforcement agencies originally (Ashworth, 1998).

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